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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	
MILLER GRAIN COMPANY, INC.,	**CASE NO. 02-41324-7**
	CHAPTER 7
DEBTOR.	

MEMORANDUM OF DECISION

This matter is before the Court for resolution of one final issue left undecided at a hearing held on January 6, 2003. Debtor Miller Grain Company, Inc., had operated a grain warehouse, and the hearing concerned the ownership of the grain stored there. A variety of parties and attorneys appeared at the hearing, but only two attorneys have filed briefs concerning the remaining issue. Counsel Justice B. King filed a brief for the Grain Dealers Mutual Insurance Company ("Grain Dealers"). Counsel Robert D. Crangle filed a response for Riverside Farms, Inc. ("Riverside"). The Court has considered the evidence presented on January 6 and the relevant pleadings on file, including the two new briefs, and is now ready to supplement the findings it announced on January 6, and rule on the last issue. It is unclear whether any other parties are interested in this issue, but the Court intends this decision to resolve the issue with respect to all the parties.

As indicated, the debtor had operated a grain warehouse. It ran into difficulties, and an involuntary chapter 7 bankruptcy petition was filed against it in May 2002. The debtor got the case converted to chapter 11 briefly, but it was converted back to chapter 7 on July 1, 2002.

The chapter 7 trustee filed a report showing the results of the liquidation by the State of Kansas

of the grain stored in the debtor's warehouse, the status of various grain ownership claims as shown by the debtor's records, and the ownership claims filed with the Court. Several parties filed objections to this report. The trustee filed objections to a number of the ownership claims filed with the Court, and some of the claimants filed responses. All these matters were included in the hearing held on January 6, 2003.

At the conclusion of the evidence, for reasons stated on the record, the Court sustained many of the trustee's objections to claims, overruled some, and adopted the parties' agreements on others. Some of the claimants had entered into deferred payment or delayed pricing[1] contracts with the debtor, and with one limited exception, the Court ruled on the record that these claimants were no longer the owners of the grain covered by those contracts. The exception was that the Court took under advisement the question whether the Kansas Supreme Court's decision in *McCain Foods USA, Inc., v. Central Processors, Inc.*,[2] supplied a legal basis for the Court to void the deferred payment or delayed pricing contracts, and restore these claimants' ownership of the grain covered by their contracts with the debtor.

Riverside was one of the claimants who voluntarily entered into a delayed pricing contract with the debtor prepetition. K.S.A. 34-2,111 establishes various requirements for such contracts. As the Court stated at the hearing, the contracts the debtor offered to grain producers like Riverside complied with the requirements of that statute, as did the deferred payment contracts that other producers agreed

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[1]The parties have referred to these as "deferred pricing" contracts, but K.S.A. 34-2,111 refers to them as "delayed pricing" contracts. The Court will use the statutory terminology.

[2]275 Kan. 1, 61 P.3d 68, 2002 WL 31840886 (2002).

to. Generally, the debtor sent or gave the contracts to the producers, who signed them at a later date and returned them to the debtor. Like most of the producers, Riverside had not entered into such a contract in the past. The debtor's contracts clearly stated that the debtor was buying a fixed amount of grain that the named producer had stored with the debtor. In return for selling the grain, the producer no longer had to pay a monthly storage charge, but instead had to pay a delayed pricing charge that was about one-half of the former storage charge. Under the delayed pricing contracts, the producer-seller also received a right to select a future price for its grain; this right is similar to one that an owner of stored grain would have. The debtor's deferred payment contracts gave the producer-sellers the right to name a date in the future for payment, but fixed the price for the grain being sold. As required by K.S.A. 34-2,111(b), the debtor's delayed pricing and deferred payment contracts stated in all capital letters that the producer selling the grain specified in the contract was making a voluntary extension of credit to the debtor and that the contract was not protected by the debtor's public warehouseman's surety bond. To simplify references to the producers who sold grain to the debtor under either delayed pricing or deferred payment contracts, the Court will hereafter refer to them as "Producer-Sellers."

Although Riverside and other Producer-Sellers tried to present evidence that the debtor orally informed them that their contracts would not alter their status as owners of the grain they had stored with the debtor, the Court is convinced that the contracts clearly expressed the parties' intention that the debtor was purchasing and the Producer-Sellers were selling the specified grain, so the parties may not contradict that facet of the contracts with such evidence.[3] The Court also notes that none of the

[3]*See* K.S.A. 84-2-202.

Producer-Sellers, including Riverside, presented evidence that they tried to exercise the right, specified in K.S.A. 84-2-702, to reclaim the grain they sold to the debtor because of any fraudulent or innocent misrepresentation of solvency, nor did any of them cite that provision as a basis for granting them relief in this matter.

The Court has now considered *McCain Foods* and its implications for the Producer-Sellers, and concludes that it does not establish a legal basis for voiding their contracts with the debtor. *McCain Foods* involved the Kansas Uniform Fraudulent Transfer Act ("UFTA").[4] The Producer-Sellers are apparently relying on UFTA §33-204, which provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor
>
> (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (B) intended to incur, or believed or reasonably should have believed that such debtor would incur, debts beyond such debtor's ability to pay as they became due.
>
> (b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:
>
> (1) The transfer or obligation was to an insider;
>
> (2) the debtor retained possession or control of the property transferred after the transfer;
>
> (3) the transfer or obligation was disclosed or concealed;
>
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) the transfer was of substantially all the debtor's assets;
>
> (6) the debtor absconded;

[4]K.S.A. 33-201 to -212.

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[5]

Grain Dealers argues that this statute applies only to transfers of property from a debtor to others, not from others to the debtor. The Court must agree. Subsection (a) covers transfers made by the debtor, and obligations incurred by the debtor. In each transaction with a Producer-Seller, the debtor received property from and incurred an obligation to the Producer-Seller. A strict reading of subsection (a) indicates that the part of each transaction before the Court that could be attacked under it is the obligation the debtor incurred to the Producer-Seller, not the debtor's receipt of property from the Producer-Seller. That is, the debtor did not make the property transfer, the Producer-Seller did, so the property transfer is not covered by subsection (a). The debtor did incur obligations to pay the Producer-Sellers for the grain at some future time, but the Producer-Sellers are not interested in setting aside that part of the transactions. Some of the factors listed in subsection (b) also indicate at least that this is usually the situation contemplated by the statute, since sub-paragraphs (1), (2), (5), (8), and (11) are all phrased so they concern property transfers from the debtor to someone else, and not someone else's property transfers to the debtor.

UFTA's provision for a creditor's remedies further supports this reading of §33-204. Section

[5]K.S.A. 33-204.

33-207 provides:

> (a) In an action for relief against a transfer or obligation under this act, a creditor, subject to the limitations in K.S.A. 33-208, may obtain:
>
> (1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
>
> (2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by K.S.A. 60-701 *et seq.* and amendments thereto or other appropriate provision of law;
>
> (3) subject to applicable principles of equity and in accordance with the applicable rules of civil procedure:
>
> (A) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or other property;
>
> (B) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
>
> (C) any other relief the circumstances may require.
>
> (b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

Conspicuously absent from this list of remedies is the one that the Producer-Sellers seek here: recovery from the debtor of the asset the creditor transferred to the debtor. Subsection (b) comes close to this, but makes the recovery available only when the creditor has obtained a separate judgment on its claim against the debtor, not when the creditor has shown in the action under the UTFA that the debtor tried to hinder, delay, or defraud it in the transaction that produced its claim against the debtor.

The Court is convinced the fraud or misrepresentation that Riverside has accused the debtor of in this matter is not covered by the UFTA because the UFTA applies only to a creditor's attack on its debtor's transactions with third parties, not to the creditor's transaction with the debtor. Some statute or case law other than the UFTA must supply the basis for a creditor to attack its own transaction with the debtor on the ground of fraud. The Court has already rejected any other such claims that were asserted at the hearing on January 6.

The circumstances of this case also show that the equities do not favor granting Riverside the relief it seeks. Many of the claimants against the grain in the debtor's warehouse are owners of stored grain who did not enter into delayed pricing or deferred payment contracts as the Producer-Sellers did. The grain held in the warehouse is insufficient to pay all the owners of stored grain in full. Treating the Producer-Sellers' claims on an equal basis with the stored grain owners' claims would further reduce the owners' pro rata share of the proceeds that have been or will be received from the sale of all the stored grain. The contracts clearly told the Producer-Sellers that they were selling their stored grain to the debtor. Consequently, it would not be equitable to the stored grain owners who did not enter into such contracts to require them to share the grain proceeds with claimants, the Producer-Sellers, who did sell their grain to the debtor.

The surety bond appears to be sufficient to cover the difference between the grain proceeds and the owners' claims. In fact, it appears the bond would still be sufficient to cover the difference even if the Producer-Sellers were treated as if they still owned the grain they sold to the debtor. However, whatever else the Producer-Sellers might have thought about their contracts with the debtor, the contracts clearly told them that they would no longer be protected by the debtor's surety bond. Consequently, it would not be equitable to the bond company to require it to pay more money on the bond in order to cover the Producer-Sellers' claims.

Under the circumstances, even if the Producer-Sellers had convinced the Court that they could void their contracts with the debtor under the UFTA, the Court would equitably subordinate their claims against the stored grain proceeds to the claims of the grain owners who never entered into such contracts with the debtor. Furthermore, the Court would not require the bond company to pay

additional money under the bond to cover the Producer-Sellers' claims.

For these reasons, the Court rejects the Producer-Sellers' assertion that they can void their contracts with the debtor under the Kansas Uniform Fraudulent Transfer Act.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

Dated at Topeka, Kansas, this ____ day of April, 2003.

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JAMES A. PUSATERI
BANKRUPTCY JUDGE